No. 73-235

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In the Supreme Court of the United States

OCTOBER TERM, 1973

MARCO DEFUNIS, et al.,
Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington, et al.,
Respondents.

Upon Certiorari from the Judgment of the Supreme Court of Washington

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BRIEF FOR AMERICAN INDIAN LAW STUDENTS ASSOCIATION, INC. AND AMERICAN INDIAN LAWYERS ASSOCIATION, INC., AMICI CURIAE

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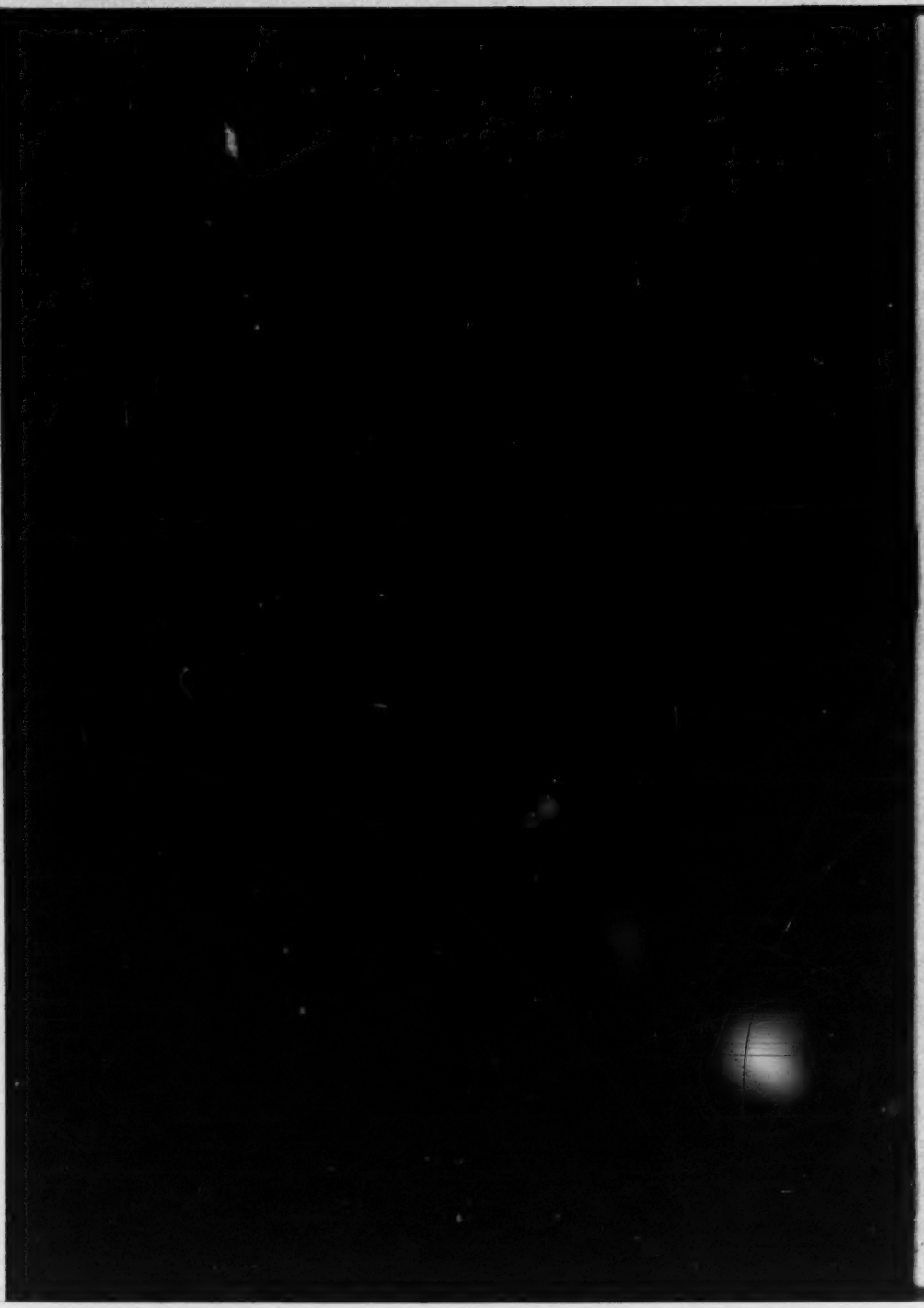


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BRIEF FOR AMERICAN INDIAN LAW STUDENTS ASSOCIATION, INC. AND AMERICAN INDIAN LAWYERS ASSOCIATION, INC., AMICI CURIAE

INTEREST OF AMICI CURIAE

This brief is submitted with consent of counsel for the parties on behalf of the American Indian Law Students Association, Inc., and the American Indian Lawyers Association, Inc.

The American Indian Law Students Association, Inc. and the American Indian Lawyers Association, Inc. are non-profit organizations whose membership consists solely of Indian lawyers and law students. The combined organizations have over 200 members representing over 40 different Indian tribes. The outcome of this case could drastically affect the number of Indians who will be admitted into law schools in the future which will directly jeopardize the progress that Indians are now making in the courts. Members of both organizations strongly support minority admission programs in law school because of the tangible benefits that Indians and Indian tribes have received as a result of the dramatic increase in Indian lawyers over the last five years. In light of the recent stated policies of Congress, the Courts and the President for increased Indian self-determination, Amici believe that an ever greater number of Indian lawyers are needed to insure that these promises do not prove to be empty like so many other promises in this nation's history. A determination that law schools can not maintain special minority admission programs will close the doors of law schools to America's most disadvantaged minority.

STATEMENT OF THE CASE

We adopt in full as the statement of the case the opinion of the Washington Supreme Court as set forth in *DeFunis v. Odegaard*, 82 Wn. 2d 11, 507 P.2d 1169, 1171-1177 (1973).

I

ARGUMENT

THE SCHOOL OF LAW MUST BE ALLOWED TO CONSIDER CRITERIA OTHER THAN MECHANICALLY DERIVED TESTS AND SCORES IF THE LEGAL PROFESSION IS TO BECOME HETEROGENEOUS.

The government of this country is basically one designed and run by lawyers. Of the three branches of government, both state and federal, almost the entire judiciary is composed of lawyers, while lawyers predom-

inate in the legislative and executive branches. See Martin Mayer, *The Lawyers*, Dell Publishing Co., 1966. Thus in all serious disputes between individuals and groups in our society, at least one lawyer is inevitably present whether resolution of such a dispute should occur in a courtroom, in the halls of the legislature, in the administrative process or simply in negotitaion. We strongly believe that a minority admission program for law schools is needed if Indians are to obtain adequate representation in the legal profession. The University of Washington, School of Law has pursued a commendable course of action in trying to serve our society as a whole and the minority communities individually by admitting qualified students from all sectors, although not all meet the standard mechanical criteria. The Washington Supreme Court points out, 507 P.2d 1169 at 1185, that while race was a major factor, it was not the only factor considered by the committee in reviewing minority applications. The Court further noted that the dean of the law school testified in the trial court that only "qualified" minorities were admitted.

Amici strongly support the concept and goal of the University of Washington that the best qualified students be accepted. But qualifications are a mixture of many things. We believe that mechanical testing devices of grades and test scores simply do not adequately measure the qualifications of an American Indian for a law school class; other considerations, including intangibles, must be considered. The point has been put in bald terms:

> "(F)ew persons have any confidence in the validity of a culture-bound test for measuring innate intelligence and most tests of mental ability are agreed to be culture-bound (especially those of the group variety)." L. Coombs, *The Educational Disadvantage of the American Indian Student* 83 (1970).

Several other studies have reached the same conclusion, both in regard to grades and standardized tests.[1]

While Amici believe that cultural bias does exist in LSATs, we also recognize the need for a minimum level of performance in grades and LSATs for admission to law schools. Although this may bar Indians who may have the native intelligence to achieve success in law school but low scores from attending school, it is a recognition that law school and the practice of law is culturally alien to Indian students. To force Indians who have not acquired all of the skills of the white culture, however, to match or better non-minority students on the same tests is an unnecessarily herculean task that few Indians can achieve. In this connection, Amici would like to draw the Court's attention to Appendix A which shows the rate of success in completing law school and being admitted to the bar that Indian students have had over the last five years. The majority of these students had LSATs and GPAs lower than the average of non-minority students, yet they were able to successfully complete their studies and are now working in Indian communities. Unless measures such as those of the University of Washington's

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[1] Perhaps the leading study on the educational performance of American Indians has been conducted by Dr. Robert J. Havighurst on behalf of the United States Office of Education. Dr. Havighurst concluded that performance of Indians in white classrooms is primarily determined, not by "innate intelligence", but by socio-economic factors including the life-style and language of the tribal culture, extreme poverty, geographical isolation, and the inability of white teachers ("excellent" through the same teachers may be with white students) to interact well with Indian students. R. Havighurst, *Education of Indian Children and Youth* 22-24, United States Office of Education (1970). See also, e.g., Berry, *The Education of American Indians* 23, published by the Special Subcommittee on Indian Education (1969); Crossland, *Minority Access To College* 62 (1971); and K. Anderson et al., *The Educational Achievement of Indian Children*, United States Department of Interior, Bureau of Indian Affairs (1953). See also, O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 Tol. L. Rev. 281 (1970).

minority admissions programs are encouraged, or at least permitted to continue, then minorities perforce have to delay until the next generation, or the generation after that, their taking an equal place not only in the legal profession but also in our society as a whole.

II

THE SCHOOL OF LAW'S MINORITY ADMISSION PROGRAM IS DIRECTED TOWARD THE COMMENDABLE GOAL OF PRODUCING MORE INDIAN LAWYERS.

The history of the relationship between Indian people and the federal and state governments is unique among the law of nations. As this Court said in *United States v. Kagama*:

> "The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character."
> 118 U.S. 375, 381 (1886)

This anomalous and complex relationship has been primarily a legal relationship. The legal status of Indians and Indian tribes has been a continuing issue since the discovery of the New World. *See*, e.g., Victoria, De Indis et De Jure Belli Relectiones 1 (Trans. by John Pawley Bates 1917), 1557. The United States from the signing of the first treaty with the Delaware Indians in 1778 (Treaty of September 17, 1778, 7 Stat. 13), to the present day has recognized separate legal rights and disabilities for Indians and Indian tribes. Throughout the history of the United States there has been a tripartite struggle for power over Indians between the Federal government, the states, and Indian tribes. While the degree of power of each entity has vacillated[2] the end result has been a massive and complex body of cases, statutes and treaties that

[2] Compare *United States v. Bailey* 24 F.Cas. 937 (No. 14, 495) (c.c. Tenn. 1834) and *State v. Doxtater* 47 Wis. 278, 2 N.W. 439 (1879) which appear to suggest that there is a presumption of State jurisdiction with *Kennerly v. District Court*, 400 U.S. 423 (1971) and *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965). See also *The Indian Battle for Self-Determination*, 58 Cal.L.Rev. 445 (1970).

deal with Indians and Indian tribes.[3] In addition Indians have been blessed and burdened with one of the oldest and largest federal bureaucracies in existence, the Bureau of Indian Affairs. That agency, whose duty is to "protect" Indian interests, has until recently viewed its actions as immune from judicial relief.[4] While that relief is more than welcome, it also serves to expand involvement of Indian tribes and individuals with the non-Indian legal system.

In facing this staggering legal complexity, Indian tribes and individuals have been compelled to be represented, if at all, by lawyers who are largely unfamiliar with their systems of government and their customs and traditions, and who do not and cannot identify with and understand their clients' interests completely. This desparate shortage of Indian lawyers has been widely recognized:

> "Although no segment of our society more needs representation within the legal profession than the American Indian, no group has fewer lawyers. There are well over a half-million Indians. To achieve proportionate representation at the bar, five-hundred to a thousand Indians would have to be lawyers; yet there are perhaps not more than two dozen practicing lawyers who identify as Indian in the entire United States. The number who are actively engaged in work affecting Indians is even less." T. Christopher and F. Hart, *Indian Law Scholarship Program at the University of New Mexico*, 1970 Toledo L.Rev. 691, 692-93.[5]

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[3] Merely to scratch the surface of the truth of this statement, we will advise the Court that, as long ago as 1942, there were no fewer than 4,264 statutes and 389 treaties dealing with Indians, F. Cohen, *Federal Indian Law* 457 (1942).

[4] See, e.g., *Tooanippah v. Hickel*, 397 U.S. 598 (1970); *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971); *Pyramid Lake Tribe v. Morton*, 354 F.Supp. 252 (D.C.D.C. 1972).

[5] See also, Strickland, *Redeeming Centuries of Dishonor: Legal Education and the American Indian*, 1970 Toledo L. Rev. 847, 861-62; Note, *The Indian: The Forgotten American*, 81 Harv.L.Rev. 1818, 1833, n. 122 (1968).

While Indian tribes and individuals have at times received adequate legal representation from non-Indian lawyers, even the best of non-Indian lawyers is incapable of meeting certain long unsatisfied needs of Indian people. A successful attorney-client relationship requires more than legal skills and knowledge on the part of the lawyer and an ability to pay on the part of the client; it requires open communication and trust. A non-Indian lawyer and his Indian clients must surmount obstacles resulting not only from their oftentimes different languages, and economic positions, but they also must each overcome their own hesitancies to deal openly with members of another race and another culture. In addition to being able to communicate with and elicit the trust of his Indian clients more easily, an Indian lawyer has certain advantages that a non-Indian is unlikely to have in representing Indian clients. First, an Indian lawyer, as an Indian, will share a community of interest with his client and his client's legal problems that a non-Indian is incapable of obtaining. Second, an Indian lawyer in representing members of his community or the tribe itself will be more accountable to his clients than his non-Indian counterpart, for the non-Indian can always abandon the reservation for white society and forget the Indian world exists, while to the Indian it is home and family. Conversely, the Indian lawyer is far more likely to want to live on a geographically isolated reservation than is a non-Indian and thus is more likely to acquire the necessary expertise in Indian law and to provide the continuity of legal services so necessary to his clients. Fourth, an Indian lawyer will have the advantage of having grown up in the Indian world while having acquired his formal education in the white world. Thus at the outset of his practice he will be able to communicate and translate the viewpoints of both the Indian and the non-Indian worlds to the other without having to undergo the time-consuming learning process a non-Indian must. Fifth, an Indian lawyer who has grown up with the reservation system and has developed a feel for its practical aspects, will presumably develop a practical expertise in Indian law more quickly than the non-Indian. Sixth, the Indian lawyer will know the needs of the Indian community; he will be able to diagnose, and aggressively

pursue, the type of litigation that will most benefit the Indian people in both the long and the short term. Finally, an increase in the number of Indian lawyers will develop pride within the Indian community and will be a step toward the much-acclaimed goal of "self-determination."[6]

In the attainment of this latter goal, the need for Indian lawyers is crucial. Since the landmark case of *Worcester v. Georgia* 31 U.S. (6 Pet.) 515 (1832) to the present there has been a persistent recognition of tribal rights of internal self-government subject only to the dictates of Congress. In the last term, this Court in *McClanahan v. State Tax Commission of Arizona* 411 U.S. 164 (1973) reaffirmed Indian tribes' rights of self-government and the concurrent rights that Indians have as American citizens and citizens of the states. *See also Williams v. Lee*, 358 U.S. 217 (1959); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969). However, as the power of tribes to determine their own affairs has continued, Congress has determined that the management and control of the internal tribal affairs must meet certain prescribed standards that are foreign to tribal society. The Civil Rights Act of 1968[7] is the most obvious example of this process. Prior to the passage of that Act, Congress had not imposed restraints similar to the Bill of Rights on tribal governments. *Talton v. Mayes*, 163 U.S. 376 (1896); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959); *Barta v. Ogala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958). While it may be that the standards tribal governments must not meet are not identical to the constitutional restraints imposed on the federal and state governments, it is nevertheless true that the imposition of those standards will have an impact on tribal society that has yet to be fully known. In *McCurdy v. Steele* 353 F. Supp. 629, 632-33 (1973) the court noted that:

> "The Indian Civil Rights Act appears to have been tailored by Congress to the purpose of enhancing the

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[6] See, e.g., President Richard M. Nixon, *Message to Congress*, July 8, 1970.

[7] Act of April 11, 1968, 82 Stat. 77, 25 U.S.C. § 1301 et seq.

civil liberties of individual Indians without unduly undermining Indian self-government and cultural autonomy. The law incorporates guarantees found in the Bill of Rights with regard to certain basic liberties including due process, equal protection, free exercise of religion, freedom of speech and safeguards during criminal proceedings. But the Senate committee deleted restrictions contained in the proposed statute upon the establishment of religion and the use of racial voting classifications when it appeared that the first restriction would undermine Indian theocracies and the second would undermine tribal cultural autonomy generally. Furthermore, the record suggests some concern at least that those guarantees incorporated by the Indian Civil Rights Act not be unduly disruptive of tribal culture. It would thus appear that the Indian Civil Rights Act is properly considered in the context of federal concern for Indian self-government and cultural autonomy: Its guarantees of individual rights should, where possible, be harmonized with tribal cultural and governmental autonomy."

Harmonizing these three values will be a difficult and extremely delicate task not only for the federal judiciary, but also for tribal councils and tribal courts. Unless there are Indian lawyers available to help perform this task, then the goal for self-determination and viable tribal governments will become ever more impossible to achieve.

III

RACE IS A CONSTITUTIONALLY PERMISSIBLE CLASSIFICATION FOR AMERICAN INDIANS.

The Washington Supreme Court has determined that racial classifications are not unconstitutional per se. 507 P. Rp. 2d 1169, 1178-1181. Indians have been constitutionally classified by race throughout the history of the United States. Congress has enacted a comprehensive statutory scheme in Title 25 of the United States Code and elsewhere which deals with almost every aspect of a res-

ervation Indian's life — matters of education,[8] health,[9] civil liberties,[10] welfare,[11] transfers of land,[12] validity of contracts,[13] testamentary disposition,[14] and expenditures of tribal funds.[15] All of these statutes involve explicit classifications by race;[16] none have for that reason been held violative of the Fifth Amendment. There are numberless other statutes and regulations dealing solely with Indians, including a hiring preference for Indians in the Bureau of Indian Affairs, a federal agency.[17]

The federal government under the due process clause of the Fifth Amendment has no "lesser duty" than the states do under the equal protection clause of the Fourteenth Amendment to avoid the practice of invidious discrimination on the basis of race. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Nevertheless Congress has since the inception of this country enacted a multitude of statutes conferring burdens and benefits on persons solely on the

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[8] See, e.g., 25 U.S.C. §§ 13, 297.

[9] See, e.g., 25 U.S.C. §§ 231, permitting entry upon reservations to enforce health regulations.

[10] See, e.g., 25 U.S.C. §§ 1301-03.

[11] See, e.g., 25 U.S.C. §§ 305-309 (a).

[12] See, e.g., 25 U.S.C. §§ 348, 391, 393.

[13] See, e.g., 25 U.S.C. §§ 81, 82, 82(a), 84, limiting contracts without the apporval of the Secretary of the Interior.

[14] See, e.g., 25 U.S.C. §§ 371-80, which requires the approval of the Secretary of Interior in regard to many testamentary dispositions.

[15] See, e.g., 25 U.S.C. § 122.

[16] Cf. *United States v. Rogers* 45 U.S. (4 How.) 567 (1846).

[17] 25 U.S.C. § 472. This Court has granted certiorari in *Mancari v. Morton* 359 F.Supp. 585 (D.C.D.N.M., 1973) to determine whether the Indian Preference statutes, 25 U.S.C. §§ 44-46, and 472 were amended by the Civil Rights Acts of 1964 and 1972, 42 U.S.C. §§ 2000 et seq. and Public Law 92-261.

basis of their Indian race. The constitutionality of those statutes against the claim of racial discrimination has rarely been questioned, and in all cases has been upheld. As the Court said in *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808, 814 (E.D. Wash. 1966):

> "Indeed if legislation is to deal with Indians at all, the very reference to them implies the use of a 'criterion of race.' Indians can only be defined by their race."

This Court has explicitly affirmed the case of *Simmons v. Eagle Seelatsee, supra*, which held that a federal statute prohibiting the inheritance of trust property from an Indian by a white person is not an invidious racial discrimination. 384 U.S. 209 (1966). *See also Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971). To now hold that a similar classification by a state runs afoul of the Fourteenth Amendment jeopardizes the entire scheme Congress has enacted in its exercise of power over Indian tribes and individuals. In *Elk v. Wilkins*, 112 U.S. 94 (1884), this Court held that the Fourteenth Amendment did not confer citizenship rights on Indians maintaining tribal relations; it was not until 1924, more than half a century after the Fourteenth Amendment took effect, that Congress finally granted all Indians born in this country the rights of citizenship.[18] It would indeed be a bitter irony for this Court to hold that the Fourteenth Amendment now bars special admissions in law schools for Indian students when the University of Washington is so clearly serving a national purpose.

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[18] 8 U.S.C. § 3.

IV

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Washington Supreme Court should be affirmed and the case be dismissed.

Dated: January 31, 1974

HERBERT BECKER
BARBARA A. FIX
BRUCE R. GREENE
FRED L. RAGSDALE

By:
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APPENDIX A

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January 28, 1974

Honorable Justices
Supreme Court of the United States
Washington, D.C.

Dear Justices:

I have been asked by the American Indian Law Students Association and the American Indian Lawyers Association to provide some figures in respect to Indian attendance in law schools in the United States and their practice of law upon graduation.

The Special Scholarship Program in Law for American Indians provides living stipend assistance to almost all Indian law students while they are in school. Participants in the program attend law schools throughout the United States. The program is a relatively new one in that it has only been operational since 1967. Since that time there have been four (4) graduating classes from law schools. Our figures show that there have been 86 Indian students

who have entered law schools and, in the normal three (3) years it takes to complete studies for a law degree, 57 have graduated, for a completion of 67%. Most of these Indian students had lower GPAs and LSATs on entering law school than the average law school admittees. Of the 57 who have graduated, there are currently 54 who are working in areas directly affecting the Indian population or in Indian related fields. This means that 95% of our graduates are closely involved in Indian affairs. Six (6) of the 57 students graduated at the end of the first semester 1973, and have yet to take a bar examination. Of the 51 graduates who have taken a bar exam, 37 have been admitted to practice, for a 73% bar examination success rate. We are confident that those who were unsuccessful in taking their first bar examination will meet with more success on their next attempt.

The figures cited above are indicators of many things. First and foremost of these is the fact shown that if an Indian student is given the opportunity to enter law school, there is an excellent chance that he or she will graduate from law school. This success rate of 67% is quite comparable to the national law school average as reported in the American Bar Association Journal February 1972, Volume 58, page 147. These figures also indicate the strong commitment of Indian law school graduates to the Indian people and their rights. Finally, I believe these figures show that if an Indian student is given the opportunity to enter law school he or she will graduate, and upon graduation the chances are excellent that he or she will gain admission to the practice of law and ultimately serve the interests of his or her people.

Respectfully,

s/Philip S. De Loria
PHILIP S. DE LORIA
Director, Special Student Scholarship Program in Law or American Indians

PSD: ls

AFFIDAVIT OF SERVICE BY MAIL

Yvonne Romero, being duly sworn, deposes and says:

I am a citizen of the United States, over 18 years of age and employed in the County of San Diego, California. I served the Brief for American Indian Law Students Association, Inc. and American Indian Lawyers Association, Inc., Amici Curiae by placing three copies thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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Each envelope was then sealed and with air mail postage fully prepaid deposited in the United States mail at Escondido, California on February 2, 1974.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 2, 1974 at Escondido, California.

Yvonne Romero

YVONNE ROMERO

Subscribed and sworn to before me this 2d day of February, 1974 at Escondido, California.

Barbara A. Fix

NOTARY PUBLIC

OFFICIAL SEAL
BARBARA A. FIX
NOTARY-PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires August 21, 1976